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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1167

JAMES R. McHALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Counsel on behalf of the Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals entered in the above case on December 17, 1975.

OPINIONS BELOW

The Judgment and Commitment of the United States District Court for the Eastern District of Kentucky, Covington, is appended hereto as Appendix No. 1, but to Petitioner's best knowledge is not officially reported. The Opinion of the United States Court of Appeals for the 6th Circuit is appended hereto as Appendix No. 2, and to the best of Petitioner's knowledge is not officially reported.

JURISDICTION

The Opinion and Order of the United States Court of Appeals, for the 6th Circuit, that Petitioner seeks to be reviewed was entered on December 17, 1975, (Appendix No. 2).

Petitioner has moved for a stay of mandate to the United States Court of Appeals for the 6th Circuit, and moved for an extension of time in which to file a Petition for Writ of Certiorari to the United States Supreme Court. The Motion to the 6th Circuit was granted on January 14, 1976, (Appendix No. 3). Justice Stewart granted Petitioner's Motion on January 13, 1976, (Appendix No. 4).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) in that the Petitioner has been "denied due process of law" under the United States Constitution, Amendment 5, because sentences imposed or upheld in tax cases by various United States Judges and in various districts are totally capricious and because of denial of appellate review of sentences.

QUESTIONS PRESENTED

I.

Whether it is a denial of due process of law under the Fifth Amendment of the Constitution to deny the Petitioner herein, or any person so situated, equal protection or consideration under the law where certain judges and judges of certain United States District Courts routinely probate tax offenders and other judges just as routinely impose jail sentences and in certain cases, maximum jail sentences?

II.

Whether, it is a denial of due process of law under the Fifth Amendment to the United States Constitution to deny appellate review of criminal sentences while providing for such review in civil cases?

III.

Whether the United States may forum shop for a District Court that, on the average, applies more severe standards of punishment?

IV.

Whether, a Federal District Judge in imposing sentence must use or consider reasonable criteria and standard for sentencing and probation such as set forth in the *American Bar Association, Standards for Criminal Justice?*

V.

Can a District Judge summarily reject a motion for reduction of sentence without a hearing or rendering or anything other than an order stating overruled?

VI.

Whether there is a distinction between insanity and a state of mind that negates willfulness?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, with due process of law; nor shall private property be taken for public use, without just compensation."

also *Standards for Criminal Justice, American Bar Association,* as set forth in the Appendix, (Appendix No. 5).

STATEMENT OF THE CASE

On the tenth day of December, 1974, the Petitioner was convicted on three (3) counts of willfully and knowingly failing to file income taxes in violation of 26 U.S.C. § 7203. Defendant was sentenced in the United States District Court for the Eastern District of Kentucky to three one-year terms to be served concurrently.

Petitioner objected to venue but his objection was overruled, (Appendix No. 6). This is an important point as it forced him to be tried in a district that routinely imposes sentences in "failure to file" cases that are much harsher than the norm.

Of four "failure to file" cases in the Eastern District of Kentucky, three resulted in jail sentences, two of those being for a maximum term, (Appendix No. 7).

In the Western District of Kentucky, where Petitioner should have been tried, only four out of eight failure to file offenders were imprisoned and none of these were for the maximum, (Appendix No. 8).

The severity of Petitioner's sentence is highlighted when one realizes that in all tax cases in which sentences were imposed in 1974 (including felonies and not just misdemeanors as in Defendant's case) in the United States Courts, of 1,162 persons sentenced, only 387 were sent to jail, 669 were probated and 102 were fined only. Of all felony and misdemeanor sentences together the average span of imprisonment was only 12.8 months, (Appendix No. 9).

The injustice of the sentence imposed by the Court is all the more shocking considering the background of the Defendant/Petitioner's record. As brought out in the case, Petitioner had only a high school education. He has only one skill and aside from his family only one interest, photography. (Tr. pp. 92-93 Petitioner has asked the Clerk to certify the record).

Petitioner devoted all of his time and energy to building his business and raising his four daughters. His procrastination in dealing with his tax affairs was the result of intimidation by, and ignorance and misapprehension about, the tax laws rather than any deliberate idea or design to cheat the government, (Tr. pp. 95-113) as verified by a neuropsychiatrist who examined him (Tr. pp. 123-133).

Petitioner, at the time of sentencing, had paid all taxes owed (Tr. p. 77). He operates a personal service (photography) business that his absence may well destroy (Appendix No. 10) leaving eight people unemployed and ending the taxes paid by the business, the employees and the Petitioner. The destruction of Petitioner's business will impoverish both him and his family. Petitioner has

absolutely no other offenses on his records and has made arrangements with accountants to keep his taxes in good order henceforth. (Appendix No. 10).

Under the *American Bar Association Standards* (Appendix No. 6) Petitioner was a prime candidate for probation (See Petitioner's Memorandum in Support of Motion to Reduce Sentence) (Appendix No. 5). The letters poured out by his employees, customers and friends showed the community support he would have in his rehabilitation attempts (Appendix No. 11).

As with Petitioner's Motion for Change of Venue, his Motion for Reduction of Sentence was summarily overruled without hearing or explanation, (Appendix No. 12).

ARGUMENT FOR ALLOWING WRIT

The Writ should be allowed because substantial questions of Federal Law are disposed of by the Court of Appeals with only a per curiam decision and that these questions have not been, but should be, settled by the Supreme Court of the United States. Also, a departure from judicial procedure was sanctioned calling for the supervision power of the Supreme Court.

In the Court of Appeals, the panel indicated that it could not hear arguments as to the propriety of the sentence or as to any disparity between sentences imposed by Federal District Courts. The Court verbally indicated that such matters were for Congress to settle, not the Courts.

This not only flies in the fact of prior 6th Circuit cases, *United States* v. *Moody*, 371 F2d 688 (6th, 1967), *United States* v. *McKinney*, 427 F2d 449, (6th, 1970), *United States* v. *Daniels*, 446 F2d 967 at 972 (6th, 1971) but *Williams* v. *State of Oklahoma*, 358 U.S. 576 (1959).

As can be seen from statistics from the Administrative Office of the United States Courts, sentencing in tax cases is a form of Russian Roulette depending on the District in which you are sentenced (Appendices No. 7, No. 8 and No. 9). Nationwide you have a one-in-three chance of doing time even in felony cases (and misdemeanors). The whims of one man acting without guidelines other than statutory maximum and minimum determine the winners and losers.

Petitioner believes the more detailed administrative records and breakdowns available to the Court should move the Court to recognize the constitutional magnitude of the problem of discrepancies in sentencing. It is no longer sufficient for courts to say that sentences within the statutory maximum are nonreviewable. Statutory maximums are applied by human beings. The Constitution requires, or should require, judges to use reasonable standards in the imposition of sentences and state the reasons for those standards, so as to avoid the great discrepancies that exist presently.

When the ninety-two district courts of the United States routinely imposed such different sentences in such cases as taxes, Selective Service, etc.: in identical situations, it is obviously a denial of equal protection of the law.

It was best stated by Judge Marvin E. Frankel. He said that the present situation "is a wild array of sentencing judgments without any semblence of the consistency demanded by the ideal of equal justice." *Criminal Sentences,* Marvin E. Frankel, Hill and Wang, New York, 1972, at Page 7.

> ". . . what no businessman wants (if he is honest) is a system of 'individualized' rates and exposures, depending upon who the judge or other official may

turn out to be and how that decision-maker may access the case and individual before him.

This does not mean, of course, that everybody pays the same income tax or is held to the same standards of liability. It does mean that the variations are made to turn upon objective, and objectively ascertainable, criteria-impersonal in the sense of the maxim that the law 'is no respector of persons' — and, above all, not left for determination in the wide-open, unchartered, standardless discretion of the judge administrating, 'individual' justice." Frankel, at pp. 10-11.

Judge Frankel quotes from a senate document, *Of Prisons and Justice, Countdown for Judicial Sentencing* Senate Document No. 70, 88th Congress, 2nd Session, Page 331 (1954) at pages 21-22 in Judge Frankel's book.

"Take for instance, the cases of two men we received last spring. The first man had been convicted of cashing a check for $58.40. He was out of work at the time of his offense, and when his wife became ill and he needed money for rent, food and doctor bills, he became the victim of temptation. He had no prior criminal record. The other man cashed a check for $35.20. He was also out of work and his wife had left him for another man. His prior record consisted of a drunk charge and a non-support charge. Our examination of these two cases indicated no significant differences for sentencing purposes. But they appeared before different judges and the first man received 15 years in prison and the second man 30 days.

These are not cases picked out of the air. In January, the President of the United States commuted to time served the sentence of a first offender, a former Army lieutenant, and a veteran of over 500 days in combat, who had been given 18 years for forging six small checks.

> In one of our institutions, a middle-aged credit union treasurer is serving 117 days for embezzling $24,000 in order to cover his gambling debts. On the other hand, another middle-aged embezzler is serving 20 years with 5 years probation to follow. At the same institution is a war veteran, a 39-year old attorney who has never been in trouble before, serving 11 years for illegally importing parrots into this country. Another who is destined for the same institution is a middle-aged accountant who on tax fraud charges received 31 years and 31 days in consecutive sentences. In stark contrast at the same institution, last year an unstable young man served out his 98 day sentence for armed bank robbery."

The same theme was taken up by Doctor Willard Gaylin in his book *Partial Justice, A Study of Bias in Sentencing*, Kopf, 1974. He points out:

> "In Oregon, of thirty-three convicted Selective Service violators, eighteen were put on probation; in Southern Texas, of sixteen violators, none were put on probation. In Oregon, not a single man was given a sentence of over three years; in Southern Texas, fifteen out of sixteen were given over three-year sentences — fourteen were given the five-year maximum allowable by law. In Southern Mississippi every Defendant was convicted, and everyone given the maximum of five years." Gaylin, supra pp. 6-7.

Gaylin points out that Federal studies show alarming differences in lengths of sentences.

> "In one circuit of the United States Court of Appeals the average sentence imposed in all United States District Courts in its jurisdiction was 11 months while in another it was 78 months." Gaylin p. 7.

Gaylin, quoting another researcher, makes a point applicable to the circumstances of the Petitioner in the present case.

> "Another researcher who, to his dismay, found on statistical evaluation that, 'the shortest possible sentences were imposed upon the dangerous habitual, professional offenders while much longer sentences were frequently imposed upon the relatively harmless, situational and occasional offender.' " Gaylin, p. 9.

Also applicable to the present case is:

> "Perhaps the saddest case of all are those where there is not demonstrable evidence of animosity; no demonstrable evidence of bias; no technicalities on which appeal could be based; and yet, the sense of the unfairness of things is evident because of the dis-proportionate, extreme, unusual and excessive sentences. There are literally dozens of cases in which seemingly like men tried for like offenses are given cruelly different sentences." Gaylin, p. 10.

The Court can no longer hide from this constitutional issue. The Court should no longer take the position that sentencing is not reviewable. Frankel says at pp. 76-77:

> "The basic point remains as I have stated it: neither the federal courts nor most states provide for any effective appellate review of sentences. I cannot know whether the reader finds this as horrendous as I do after living with it as a fact of professional life for many years. Consider that civil judgment for $2,000 is reviewable in every state at least once, possibly on two appellate levels. Then consider the unreviewability of a sentence of twenty years in prison and a fine of $10,000. Consider that a distinguished committee of the American Bar Association, not normally an agency of revolution, when it urges appellate review of sentences in a report adopted and endorsed by the association in 1968, pointed out 'that in no other area of law does one man exercise such unrestricted power' (as the trial judge's unreviewable sentencing power). No other country in the free world permits this condition to exist."

The District Courts need and should have discretion in sentencing to fit the individual facts of a case, but if uniform standards of sentencing are to be imposed, as demanded constitutionally and by common sense, sentences must be subject to review. This Court should review the sentence imposed in this case or remand it for reconsideration.

Disparity in sentencing is not confined to state courts but affects the federal system as well. Gaylin quotes Federal Judge Walter Hoffman as stating that such problems do not exist in the federal system. This statement was made in 1969 and again in 1971.

> "During that period disparity in sentencing was not only reported in numbers of technical journals in criminology and law, but had also become front page news. The prison reform movement was given impetus in large part because of the infusion of middle-class people (drug offenders and Selective Service violators) into the prison system. A front-page article in the *Wall Street Journal* was headlined: *'Unequal Justice: A Growing Disparity in Criminal Sentences Troubles Legal Experts.'* The article quotes such people as Federal Court Judge Theodore Levin, and James V. Bennett, former director of the Federal Bureau of Prisons (both from the same federal system to which Judge Hoffman was addressing himself), who were almost in despair about the inequality of sentences. Among the numerous examples the article cites in the year of 1968; Violators of the Federal Forgery Laws received an average jail term of twenty months in New York seven district (sic). But in Central California the same offense drew an average sentence of forty-five months, and in Kansas the average was seventy months. For narcotic offenses, a federal court in Connecticut handed down sentences that averaged forty-four months; in Southern Texas the average term was ninety months.

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> All of the judges I interviewed felt there was a disparity of sentencing. Most of them felt it was a serious problem." Gaylin, pp. 11 and 12.

The issue of sentence review and the issue of sentence standards is one of constitutional magnitude and is ripe for adjudication.

The denial of the Motion for Change of Venue and to Reduce Sentence should also be reviewed as it involved a serious departure from the accepted and usual course of judicial proceedings and conflicts with applicable decision of the Supreme Court.

As Petitioner stated to the District Court in his Memorandum in Support of Motion for Change of Venue (Appendix No. 6). Rule 18 of the Federal Rules of Criminal Procedure requires that trial be held in the district in which an offense is committed unless otherwise provided by law. 18 U.S.C. 3237 does permit a defendant to transfer a "failure to file" case to the district of his residence if begun elsewhere. But no provision is made to reverse this situation. 18 U.S.C. 3237 also allows prosecution in any district in which an offense has been committed, where an offense has begun in one district and is completed in another or is done in more than one district.

However, it has never been held that a failure to file a tax return falls under these rules. The rule has been established in such cases, that the jurisdiction and venue lie in the district and division where the act was required to be done. *Evans* v. *United States,* 394 F2d 653 (1965), *DeCeasare* v. *United States,* 356 F2d 107 (1966) (Vacated on other grounds 390 US 200). When a crime charges failure to do a legally required act, the place fixed for its performances fixes the situs of the crime. *Johnston* v. *United States,* 351 US 215 (1956), Reh. den. 352 US 860. See also *United States* v. *Neil,* 248 F2d 383 (1957).

The United States which charges, in its information, that Petitioner failed to file a return both with the District Director at Louisville or with the then Service Center at Covington, argues that the return could also have been filed in Covington, and thus venue lies with the Eastern District of Kentucky. This is a false argument. The District Director who, for all of Kentucky, resides in Louisville is the official in charge of transacting all tax matters in his district even though you are now permitted to send returns directly to service centers. The crime was committed where the collection district was centered. *United States* v. *Wyman,* 125 F. Supp. 276 (D.C. No. 1954), *United States* v. *Ross,* 135 F. Supp. 842 (D.C. of Md. 1955), *United States* v. *Arborough,* 16 FRD 212 (D.C. of Md. 1954) Aff. 230 F2d 56, Cert. Den. 351 US 969, see also *United States* v. *Lefkoff,* 113 F. Supp. 551 (E.D. Tenn. 1953).

The salutory effect of this rule is well demonstrated in the case of Covington, Kentucky, which having its own service center is now served by the service center in Memphis, Tennessee. Over the past years, returns from Covington have gone to Louisville, Covington and Memphis, as was administratively convenient to the Government. But failure to file and other investigations are handled under the Louisville Division.

If meaningful application is to be made of the Petitioner's constitutional right to confront his accusers, the case should have been transferred to Louisville where the charges arose. It would be highly prejudicial to say that trying the case at Covington would not prejudice the Petitioner because he lives in the Eastern District of Kentucky, because in fact, the Petitioner's business and most of his community life and waking hours are spent in Cincinnati, Ohio.

The denial of change of venue was prejudicial in this case because, among other reasons, the Petitioner was forced to be tried and sentenced by a judge who routinely imposed maximum sentences while judges in the Western District of Kentucky individualize sentencing to consider alternative sentencing provisions fitting the Petitioner and the nature of the crime, as will be argued hereafter.

When the Petitioner made a motion and filed a memorandum in support of his Motion for Reduction of Sentence pursuant to the Federal Rules of Procedure (Appendix No. 5) ; the sentencing Judge had died. Therefore, the Motion went before the Honorable David L. Hermansdorfer, the United States District Judge for the Eastern District of Kentucky, who had temporarily taken over the Covington docket.

Petitioner brought to the attention of the Court certain facts that he felt showed that the sentence was unwarranted in the circumstances of the case.

The American Bar Association in its *Standard for Criminal Justice* in the Volume on *Sentencing Alternatives and Procedures* sets the following standards on pages 2-3:

> **2.5 Total Confinement.**
>
> (c) a sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the selection of total confinement in given cases are:
>
> (i) confinement is necessary to protect the public from further criminal activity by the defendant; or,
>
> (ii) the defendant is in need of correctional treatment which most effectively would be provided if he is placed in total confinement; or,

(iii) it would unduly depreciate the seriousness of the offense to impose a sentence other than total confinement. On the other hand, community hostility to the defendant is not a legitimate basis for imposing a sentence of total confinement.

The reasons for supporting these conclusions are set forth in Appendix A in Petitioner's Memorandum in Support of his Motion for Reconsideration to the District Court. (Appendix No. 5).

The reason for preferring probation and the criteria therefor are set forth in the *American Bar Association, Standard for Criminal Justice* in the Volume *Probation* at p. 10:

1.2 Desirability of probation.

Probation is a desirable disposition in appropriate cases because:

(i) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law;

(ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contracts;

(iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;

(iv) it greatly reduces the financial costs to the public treasury of an effective correctional system;

(v) it minimizes the impact of the conviction upon innocent dependents of the offender.

1.3 Criteria for granting probation.

(a) The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or,

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or,

(iii) it would unduly depreciate the seriousness of the offender if a sentence of probation were imposed.

(b) whether the defendant pleads guilty, pleads not guilty or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence.

The commentary supporting these conclusions is set out in Appendix "B" to Petitioner's Memorandum in Support of his Motion to Reconsider in the District Court (Appendix No. 5). We would submit to the Court that the Petitioner squarely fits the criteria for probation.

(A) He had no evil intent. (Petitioner's Affidavit and the Affidavit of John W. Baudendistal, a CPA, who for twenty-five years was an IRS Tax Officer). (Appendix No. 10, pp. 29a, 31a).

(B) Incarceration would not further rehabilitate this man who had led an otherwise blameless life but would destroy his business and destitute his family and his em-

ployees and their families. (Voluminous letters from friends, family, community and business associates attesting to Petitioner's good character and high probability of reintegration successfully into society, Appendix No. 11).

Petitioner believes that these letters show that Petitioner was a prime candidate for the rehabilitation aspects of probation. The Petitioner asks this Court as he did the lower courts to read these letters although they are many. This outpouring from his friends, neighbors, associates and employees merits the Court's attention. He is a good man who would benefit from the firm hand of correction rather than the iron one of society's vindictiveness.

Petitioner pointed out to the lower courts that imprisonment would very likely destroy his business, as it is one of personal skills and contacts, beggaring him, his family and his employees and wiping out his ability to pay taxes, doing the very thing the law involved was meant to prevent. There is every reason to believe that probated, the Petitioner will become a good tax-paying citizen.

The Petitioner also brought to the attention of the District Court the case of *United States* v. *Braun,* 382 F. Supp. 214 (S.D. N.Y. 1974). There the Court reconsidered the imposition of a brief period of imprisonment for tax evasion in view of the then recent pardon of Richard Nixon for similiar offenses. The Court said in that case Defendant was:

> "talented, gainfully employed, earnest in his discharge of family obligations, and entitled to hope for a bright, if unsung future. He needs no 'rehabilitation' our prisons can offer. The likelihood that he will transgress again is as close to nil as we are able to predict. Vengence, the greatest texts tell us, is not for mortal judges. Why, then should such a man be sentenced to imprisonment at all?"

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That Court noted that there were differences between the *Braun* case and the Nixon pardon, nevertheless, the Court said the differences were:

> "scarcely in any way that makes it comfortable to be harsher here."

While the Court believed that:

> "we are entitled to hope that motivations loftier than the threat of prison will prompt our presidents to execute the laws faithfully to promote rather than obstruct justice, and to pay their taxes,"

it, nevertheless

> "remains a source of queasiness to realize that deterence means 'making examples' of people; . . . that our relatively anonymous defendant adds at most to a mass of indistinguishable examples; and that the alleged example of a topmost leader has been declared immune by the pardoning power."

Yet the District Court summarily rejected this Petitioner's motions to reconsider sentencing without a hearing. It is Petitioner's belief that this was done because the Court has established a policy of not reconsidering any of the deceased Judge's decisions, due to the understandable overcrowded nature of the docket. Petitioner believes that this summary overruling without a hearing or consideration is an impermissible abuse of discretion under the rules and that this case should be remanded for consideration of the sentence.

In *United States* v. *Daniels,* 446 F2d 967 at 972 (6th Cir. 1971) the defendant in that case was also convicted before the same deceased Judge in the United States Court for the Eastern District of Kentucky, in a Selective Service

matter. The Court imposed a maximum five-year imprisonment sentence. The Court of Appeals affirmed and remanded for reconsideration of the five-year sentence. The sentence was suspended and the defendant placed on probation for 25 months. The Court, on page 972 of its Opinion, discussing the same Judge's sentencing procedures states as follows:

> "Third, we are disturbed by the District Court's failure to conceive of the sentencing procedure in terms of the modern penalogical philosophy praised by the United States Supreme Court in *Williams* v. *New York, supra.* In *Williams* v. *New York, supra,* at 284, 69 S. Ct. 1079, the United States Supreme Court cited with approval certain basic considerations to be used in determining an appropriate sentence: (a) the reformation of the offender (b) the protection of society (c) the disciplining of the wrongdoer, and (d) the deterrence of others from committing like offenses."

Certainly these considerations should have been applied to the Petitioner and in the circumstances of sentencing with the denial of reconsideration the sentence should be reviewed or the case remanded for reconsideration of the sentence.

At the trial of petitioner, Dr. John Toppen, a neuropsychiatrist, testified concerning the petitioner's state of mind. He stated that the petitioner, "shows an obsessive, compulsive personality, that he shows poor judgment, that he is inclined to mood swings, often with depression, that he has little satisfaction in his life, out of his work or for himself, and there are some paranoid charactertistics, as well." (TR. Page 131). Also, he testified that the obsessive, compulsive trait which he diagnosed would, in medical terms, be considered a mental illness. (TR. Page 133). Further, he testified that in his opinion, as a result

of the mental illness, the petitioner had "no willful intent to cheat the government or to defraud anyone". (TR. Page 133).

The testimony of Dr. Toppen was offered for the purpose of showing that the petitioner's failure to file his tax return was not "willful", as is required for a criminal conviction under 26 U.S.C., section 7203. No claim was made that the petitioner was "insane", or that he lacked sufficient mental capacity to know right from wrong, or lacked sufficient ability to conform his conduct to the requirements of the law. It appeared that this was recognized by the trial judge because he stated that "It is not claimed by this defendant, and the Doctor did not give any testimony that he was insane or that his mind was not sufficient to be a normal person. (TR. Page 158). However, he instructed the jury that "If you believe that he was in such a mental state on these three different occasions, three different times, that he was *incapable of intentionally and willfully and knowingly evading the law,* then, of course, you should find him not guilty". (TR. Page 159). (Emphasis supplied). This requirement that the petitioner be "incapable of intentionally and willfully and knowingly evading the law" as a result of his mental illness is tantamount to the requirement for a defense of insanity in most circuits. This should be held to be plain error. For example, in *United States* v. *Currens,* 290 F 2d 751 (3rd Cir., 1961), the Court concluded that an accused should not be held criminally responsible if: (1) he was suffering from a disease of the mind; (2) he did not possess a substantial capacity to conform the conduct in question to the requirements of the law; and (3) the disease weakened his capacity to do so. A proper instruction would have stated that the petitioner is not guilty if his deficient mental state merely negated the bad intent required by the law in fail-

ing to do what the law requires. (i.e., timely filing income tax returns).

In affirming the decision of the Trial Court, the Sixth Circuit was apparently as confused as was the Trial Judge about the difference between an insanity defense and the mere absence of the "willfulness" element. This confusion has also been apparent in other circuits. In *Benus* v. *United States,* 196 F. Supp. 601 (ED Pa., 1961), aff'd. 305 F.2d 821 (3rd Cir., 1962) the taxpayer was indicted and convicted on five counts of failing to file income tax returns. The taxpayer contended that the testimony of his own psychiatrist and the report of the prosecution's psychiatrist concurred in finding that during the years in question, the taxpayer's conduct in failing to file tax returns was not "willful". The Appellate Court acknowledged that the taxpayer had not pleaded insanity. Nevertheless, the Court deemed the taxpayer's contentions to be equal to an insanity defense and applied the rule of *United States* v. *Currens,* supra. Also, in *United States* v. *Cain,* 298 F 2d 934 (7th Cir., 1962) the taxpayer was indicted and convicted of attempting to evade or defeat tax in violation of 26 U.S.C. section 7201, and the question raised was whether the willfulness element was present. The Trial Court construed the taxpayer's contention, based on psychiatric testimony that his conduct lacked willfulness, as an assertion of an insanity defense. The Court stated:

> "If a person can distinguish between right and wrong, or if he is aware of what he is doing and has the mental capacity to choose between a right and wrong course of action, it is my view that the law requires that he be held responsible for his acts."

On appeal, the taxpayer's argument that the Court had applied the wrong test of mental competency was denied.

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In *United States* v. *Griffin,* unreported District Court decision at 69-2 USTC 9611, (WD Mo., 1969), aff'd. *per curiam* 452 F 2d 558 (8th Cir., 1970), the defendant claimed that he did not act willfully in failing to file income tax returns. The defendant's contentions were supported by the testimony of a psychologist and a psychiatrist, who testified in substance that in their opinion the defendant's failure to file tax returns was not willful, but products and symptoms of the defendant's mental illness. While no allegation of insanity was made, the Court nevertheless applied the *Durham* rule concerning mental insanity in determining whether the willfulness requirement was present. (*Durham* v. *United States,* 214 F 2d 862 C.A.D.C.)

While the failure of the Circuit Courts to distinguish between an insanity defense and the lack of willfulness appears to be uniform, this does not negate the fact that an instruction tantamount to an instruction concerning insanity is an error when the defendant's sole contention is lack of willfulness. Such an instruction shows that the Courts have refused to recognize a gray area between insanity characterized by a "Mindless, drooling vegetable" and total sanity. However, a defendant can clearly be sane — and this means not a "mindless, drooling vegetable" — and still lack willfulness. In *People* v. *Wells,* 202 P 2d 53 (1949), the Supreme Court of California, in a homicide case, very clearly stated that an insanity defense is very different from a lack of willfulness. The Court stated:

> "It must be borne in mind that insanity as a defense is one thing and the proof of the existence or nonexistence of the specific essential mental state, disjoined from any question of legal sanity, is quite another thing .... Here, the offer was to show not insanity, not a lack of mental capacity to have malice aforethought, but rather the fact of nervous tension and that the particular tension was directly relevant to the

> issue of 'purpose, motive or intent'; i.e. to the critical question as to whether defendant's overt act was done with 'malice aforethought' or was actuated by fear, genuine although unfounded in ultimate truth." 202 P 2d 53 at 69.

Essential to the California Supreme Court's conclusion in *People* v. *Wells* was the perception that the burden of proving insanity is much greater than the burden of proving lack of willfulness. The difference between an insanity defense and the lack of wilfulness is no less compelling in the case of an indictment for failure to file tax returns than in an homicide case, and it is a violation of a defendant's right to due process of law under the Fifth Amendment to the United States Constitution to require that he prove insanity when a mere lack of willfulness would absolve him of guilt.

The petition also contends that the standard applied to the willfulness requirement should be different in a case involving nonfeasance (e.g. failure to file tax returns) than in a case involving malfeasance. Malfeasance, requiring an act on the part of the doer, requires a greater degree of intent and participation, than does nonfeasance, the mere failure to act. When psychiatric testimony shows that the defendant has a defective mental state, it is more easily able to explain why the defendant neglected to perform a duty than why he did an act which the law forbids. This is especially true in a case of failure to file tax returns. One commentator stated that:

> "The class of citizenry who fail to file tax returns are to a considerable degree a different breed from those who file fraudulent returns. The pattern of nonfeasance, characteristic of those who fail to file returns, is congruent with established generalized patterns of behavior found among the mentally disturbed. The ab-

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> dication and irresponsibility involved in the failure to file is a symptom which frequently recurs in classic description of a host of psychoses, neuroses, and personality and behavior disorders. It is typical of various classes of cyclothymies and a classic characteristic of chronic depressives. The classic relationship between mental disease and the tax violation is most clearly recognized in cases of failure to file. Frequently, such persons will also be found to have ignored parking summons, to have failed to return library books and the like. They are constantly falling afoul of the rules of society requiring affirmative conduct." (Ritholz, "Intent and Psychiatric Disturbances In Tax Fraud Cases." NYU 23rd Inst. on Federal Tax, page 1339 at 1354, 1965).

Therefore, not only is it important to distinguish between an insanity defense and a lack of willfulness in all cases, but it is even more important to make such a distinction where the alleged criminal activity is an act of nonfeasance and significant psychiatric testimony is offered to show that the willfulness element was non existent.

It is essential that the United States Supreme Court recognize, as the Supreme Court of California did in 1949, that there is a clear difference between an insanity defense and a lack of willfulness, and it should instruct the Circuit Court accordingly. In the alternative, it should recognize, for apparently the first time, that the standard for determining willfulness in a nonfeasance case should be different and less onerous than in a malfeasance case.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN R. S. BROOKING
LOUIS DEFALAISE
ADAMS, BROOKING & STEPNER
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Attorneys for Petitioner

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APPENDIX NO. 1

No. 74-63

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
COVINGTON

Filed January 6, 1975

UNITED STATES OF AMERICA

v.

JAMES R. McHALE

JUDGMENT AND COMMITMENT

On this 10th day of December, 1974 came the attorney for the government and the defendant appeared in person and by counsel, John R. S. Brooking.

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty of the offense of wilfully and knowingly failing to make income tax returns in violation of Title 26, Sec. 7203, U. S. Code as charged in the Information and the court having asked the defendant whether he has or his attorney has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

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IT IS ADJUDGED that the defendant is guilty as charged and convicted. Thereupon, the probation officer submitted a presentence report to the Court.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 12 months Ct. 1; 12 months Ct. 2; and 12 months Ct. 3; imprisonment on the three counts to be served concurrently.

IT IS ADJUDGED that the defendant be imprisoned until he is otherwise discharged as provided by law.

The defendant, in the presence of this attorney, was advised by the Court of his right to appeal. Rule 32 (a) (2)

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MAC SWINFORD
United States District Judge.

* * *

APPENDIX NO. 2

No. 75-1556

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed December 17, 1975

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES R. McHALE,
Defendant-Appellant.

ORDER

Before: PHILLIPS, Chief Circuit Judge, and CELEBREZZE and MILLER, Circuit Judges.

Appellant appeals his conviction for wilfully failing to file income tax returns for the years 1968, 1969 and 1970 in violation of 26 U.S.C. § 7203 (1970). He also appeals from the denial of his motion to reduce sentence.

After consideration of the record, briefs and oral arguments of counsel, we conclude that the contentions of Appellant are without merit.

It is therefore ORDERED that the judgment of the District Court be, and it hereby is, affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

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APPENDIX NO. 3

No. 75-1556

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Filed January 14, 1976

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES R. McHALE,
Defendant-Appellant.

Before: PHILLIPS, Chief Judge, CELEBREZZE and MILLER, Circuit Judges.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

APPENDIX NO. 4

No. A-635

SUPREME COURT OF THE UNITED STATES

JAMES R. McHALE,

Petitioner,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner (s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 17, 1976.

/s/ POTTER STEWART
Associate Justice of the Supreme Court of the United States

Dated this 13th
day of January, 1976.

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APPENDIX NO. 5

EXCERPTS FROM MEMORANDUM IN SUPPORT OF MOTION FOR REDUCTION OF SENTENCE

* * *

(1) The Circumstances of the Case.

The *American Bar Association, STANDARDS FOR CRIMINAL JUSTICE,* volume on "Sentencing Alternatives and Procedures" sets forth the following norm at pp 2-3:

> 2.5 Total Confinement.
>
> * * *
>
> (c) A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the selection of total confinement in a given case are:
>
> (i) Confinement is necessary in order to protect the public from further criminal activity by the defendant; or
>
> (ii) The defendant is in need of correctional treatment which can most effectively be provided if he is placed in total confinement; or
>
> (iii) It would unduly depreciate the seriousness of the offense to impose a sentence other than total confinement. On the other hand, community hostility to the defendant is not a legitimate basis for imposing a sentence of total confinement.

The reasoning supporting these conclusions are set forth in Appendix "A".

The reasons for preferring probation and the criteria therefor are set forth in the *American Bar Association,*

Standards for Criminal Justice in the volume "Probation" at p. 10:

1.2 Desirability of Probation.

Probation is a desirable disposition in appropriate cases because:

(i) It maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law;

(ii) It affirmatively promotes the rehabilitation of the offender by continuing normal community contacts;

(iii) It avoids the negative and frequently stultifying effects of confinement which often severly and unnecessarily complicate the reintegration of the offender into the community;

(iv) It minimizes the impact of the conviction upon innocent dependents of the offender.

1.3 Criteria for Granting Probation.

(a) The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:

(i) Confinement is necessary to protect the public from further criminal activity by the offender; or

(ii) The offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) It would unduly depreciate the serious of the offense if a sentence of probation were imposed.

(b) Whether the defendant pleads guilty, pleads not guilty or intends to appeal is not revelant to the issue of whether probation is an appropriate sentence.

* * *

APPENDIX A TO MEMORANDUM

* * *

e. Preference for probation

Mixed views have been expressed in the past on the question of whether there should be a presumption in favor of probation. See, *e.g.*, Herlands, *When and How Should a Sentencing Judge Use Probation*, 35 F.R.D. 487, 497 (1964); *Seminar and Institute on Disparity of Sentences for the Sixth, Seventh and Eighth Judicial Circuits*, 30 F.R.D. 401, 442-47 (1962). The Advisory Committee believes that the starting point for every sentence should be probation or some other sentence not involving commitment or confinement, and that the extent to which commitment or confinement is employed in a given case should turn on the appearance of specific reasons which seem to call for that disposition. See § 2.2, *supra*, and §§ 2.4 (c) and 2.5 (c), *infra*.

The Model Penal Code takes a very similar position. Section 7.01 provides that "the Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public because" one of three stated conditions exists. See MODEL PENAL CODE § 7.01, Appendix B, *infra*. Compare Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMPT. PROB. 401, 438 (1958).

The results tend to support the conclusion that for many judges incarceration is the automatic sentencing response. More harm than good can be caused by such an attitude. Often institutionalization will result in little more than education of the offender in more sophisticated methods of engaging in criminal conduct, and certainly a great deal less than a realistic program of rehabilitation. Particularly in the case of first offenders, there is a much greater chance in most cases of avoiding a subsequent offense by helping the offender adjust to society than by removing him from it. See § 2.1, comment *f*, and § 2.2, comment *a*, *supra*.

In addition to the fact that probation often offers the best possibility of meaningful rehabilitation, it is consider ably less expensive than institutionalization. Figures supplied to the Advisory Committee by the Administrative Office of the United States Courts indicate that in fiscal 1964 the per capita cost of probation in the federal system was 59 cents a day, while the cost of housing a prisoner in a federal institution was $6.35 per day. The annual figures were $215 and $2,318, respectively. The Administrative Office reports in addition that probationers during the period in question earned $62 million. Intangible costs in terms of impact on a family deprived of its breadwinner, including possible welfare payments, add to the cost of incarceration, not to mention the cost per inmate of the construction of facilities for housing prisoners. Compare Herlands, *When and How Should a Sentencing Judge Use Probation*, 35 F.R.D. 487, 498 (1964). Crime Commission figures disclose that the average state spends approximately $3400 a year, excluding capital expenditures, to keep a youth in a state training school, while probation for the same period costs approximately one-tenth of that amount. Construction costs are estimated to be in excess of $20,000 per bed in a correctional institution. While the Commis-

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sion correctly points out that necessary increases are warranted in order to strengthen probation services, the expense of this sanction will still remain considerably below institutionalization. See PRESIDENT'S COMM'N, CORRECTIONS 28, 175-76.

The Advisory Committee is thus convinced both that sentences which do not involve imprisonment are more likely to be effective in the vast majority of cases and that such sentences represent a great deal less in public expenditures. It is the combination of these two factors which is believed to justify the position taken in subsection (c).

* * *

n. Preference against total confinement; criteria

Subsection (c) of this standard continues the principle stated in sections 2.2, 2.3 (c) and 2.4 (c), *supra*, to the effect that the starting point of each sentence ought to be a disposition which does not involve custody or confinement, and that a sentence to partial confinement or total confinement ought to be imposed only as factors appear which increase the severity which is warranted. As applicable here, the principle is that in the absence of a strong reason which is directly relevant to the case at bar, the court should impose a sentence less than total confinement in a correctional institution.

Subsection (c) continues to give examples of reasons which in the judgment of the Advisory Committee justify a prison term. The provisions are borrowed directly from the Model Penal Code. See MODEL PENAL CODE § 7.01 (1), Appendix B, *infra*. Compare N.Y. PENAL LAW § 65.00 (1) (eff Sept. 1, 1967).

While subsections (c) (i) and (c) (ii) are self-explanatory, perhaps subsection (c) (iii) deserves special comment. The subsection would authorize imprisonment on the

ground that a contrary disposition would unduly depreciate the seriousness of the offense. The theory underlying commitment on such a basis is similar to the idea of general deterrence, and yet more limited in effect. For certain offenses, such as embezzlement from a bank, the failure to impose a prison sentence might be unduly encouraging to similar attempts in the future and might destroy the confidence of the public in the system. Incarceration on such a theory might also be justified in the case of a particularly heinous murder, even though it was reasonably clear that the offender would not be likely to commit future offenses and that special treatment was unlikely to have any particular effect. But the purpose of the last sentence of subsection (c), on the other hand, is to emphasize that community uproar or hostility is not what is meant by (c) (iii). Public outcry is quite likely to be the least accurate measure of the appropriate disposition.

APPENDIX B TO MEMORANDUM

1:2 **Desirability of probation.**

Probation is a desirable disposition in appropriate cases because:

(i) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law;

(ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts;

(iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;

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(iv) it greatly reduces the financial costs to the public treasury of an effective correctional system;

(v) it minimizes the impact of the conviction upon innocent dependents of the offender.

Commentary

Despite probation's hesitant and restrictive growth the number of convicted felons placed on probation grows year after year. *See, e.g.,* PRESIDENT'S COMM'N, CORRECTIONS 173. The increased use of probation has been paralleled by the dramatic increase in the number of parole and probation officers in the United States, from something over 6500 in 1957 to more than 26,000 in 1968. *See* FINAL REPORT OF THE JOINT COMMISSION ON CORRECTIONAL MANPOWER AND TRAINING, A TIME TO ACT 11 (1969).

The major reason for this expanded use is the increased acceptance of the principles stated in this standard. Probation often will offer far more meaningful possibilities for rehabilitation than will other sentencing alternatives, particularly in the case of first offenders. *See* SENTENCING ALTERNATIVES § 2.3, comment *e* at 72-73. As observed in subsections (ii) and (iii) of this section, the point has both an affirmative and a negative aspect. Continuing normal community contacts has much to offer by way of affirmative contributions to the reintegration of the offender as a useful and non-offending citizen. It is, after all, the normal community in which the ex-offender must learn to live. On the other side of the coin, however, there are, as subsection (iii) observes, negative and frequently stultifying effects of confinement which can unnecessarily complicate this process of reintegration. Those who have commented on the effects of "prisonization" of offenders have catalogued these problems. *See, e.g.,* Clemmer, *Prisonization,* in THE SOCIOLOGY OF PUNISHMENT AND

CORRECTION 148 (N. Johnston ed. 1967); Wheeler, *A Study of Prisonization*, in THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 152 (N. Johnston ed. 1967). *See generally* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 165 (1967) [hereinafter cited as PRESIDENT'S COMM'N, THE CHALLENGE OF CRIME]; Nelson, *Community-Based Correctional Treatment: Rationale and Problems*, 374 ANNALS 82 (1967); Clemmer, *Behavioral Scientists and the Adult Correctional Institutions*, THE CHATHAM CONFERENCE OF MENTAL HEALTH APPLICATIONS IN CORRECTIONAL PRACTICE 43 (1960); McGee, *The Administration of Justice: The Correctional Process*, 5 N.P.P.A.J. 225 (1959).

The Advisory Committee has also isolated three other advantages which accompany the use of probation in appropriate cases. The first, stated in subsection (i), is that probation maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations. There have been numerous efforts at documentation of the point, most of which have shown the results to be encouraging. *See, e.g.*, NEW YORK STATE DIV. OF PROBATION, DEP'T OF CORRECTION, AN EVALUATION OF PROBATION SUCCESS: A STUDY IN POST-DISCHARGE RECIDIVISM (1964); THE RESULTS OF PROBATION (L. Radzinowitz ed. 1958); J. RUMNEY & MURPHY, PROBATION AND SOCIAL ADJUSTMENT (1952); M. GRUNHUT, PENAL REFORM 309-12 (1948); 2 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PROBATION (1939); COMMISSION ON PROBATION, REPORT ON THE PERMANENT RESULTS OF PROBATION, Mass. Senate Doc. No. 431 (1924); Scarpitti & Stephenson, *A Study of Probation Effectiveness*, 59 J. CRIM. L.C. & P.S. 361 (1968); Davis, *A Study of Adult Probation Violation Rates*

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by Means of the Cohort Approach, 55 J. CRIM. L.C. & P.S. 70 (1964); England, *What is Responsible for Satisfactory Probation and Postprobation Outcome?*, 47 J. CRIM. L.C. & P.S. 667 (1957); Diana, *Is Casework in Probation Necessary?*, 34 FOCUS 1 (1955); England, *A Study of Postprobation Recidivism Among Five Hundred Federal Offenders*, 19 FED. PROB., Sept. 1955, at 10; Caldwell, *Preview of a New Type of Probation Study Made in Alabama* 15 FED. PROB., June 1951, at 3; Monachesi, *A Comparison of Predicted with Actual Results of Probation*, 10 AM. SOC. REV. 26 (1945); Hughes, *An Analysis of the Records of Some 750 Probationers*, 13 BRIT. J. ED. PSYCH. 113 (1943); Gillin & Hill, *Rural-Urban Aspects of Adult Probation in Wisconsin*, 5 RURAL SOC. 314 (1940); Menken, *The Rehabilitation of the Morally Handicapped*, 15 J. CRIM. L.C. & P.S. 147 (1924).

The second additional advantage to the use of probation in as many cases as is feasible is the simple point of economy that if a cheaper system appears to be more effective, then it ought to be used. Probation costs something on the order of one-tenth of the cost of imprisonment, and while probation ought to cost more (i.e., it ought to be implemented more effectively), it is still apparent that the pre-offender cost of a properly functioning system of probation will be substantially less than the cost of institutionalization. For an elaboration, see SENTENCING ALTERNATIVES § 2.3, comment *e* at 73.

The final advantage that supports wider use of probation is stated in subsection (v). Imprisonment has its hidden costs, among which are the impact of removing the main source of income from a family. The effect of the criminal sanction on innocent dependents will be much less if the offender can be put on probation and can work to support his family at the same time.

1.3 Criteria for granting probation.

(a) The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources. Probation should be the sentence unless the sentencing court finds that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.

(b) Whether the defendant pleads guilty, pleads not guilty or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence.

Commentary

Section 1.3(a)

The principles underlying this subsection have been developed by this Advisory Committee in SENTENCING ALTERNATIVES § 2.2 & comment *a* at 62-63, § 2.3(c) & comment *e* at 72-73, § 2.5 (c) & comment *n* at 107-08. Acceptance of the advantages of probation in appropriate cases as stated in section 1.2, *supra*, supports the view that proba-

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tion should be the starting point in judicial reasoning about a specific sentence. Only when specific reasons appear from the facts of a particular case should the judge be moved towards a disposition involving incarceration. Three such reasons are stated in this section, reasons which, it is believed, exhaust the legitimate bases for imposing a sentence to confinement. In other words, unless public protection calls for incapacitation of the offender, or unless available correctional treatment can better be afforded in an institutional setting, or unless a sentence to probation would unduly depreciate the seriousness of the offense, it is the position of this section that the sentence should be one which involves some combination of community release, appropriate supervision, and helpful conditions.

The first two sentences of the standard are aimed at the same point, but from a slightly different direction. The sentence to probation, as with all sentences, should involve an individualized judgment rooted in the facts of each case and should not be denied on the basis of generalizations about types of offenses or the prior record of the offender. It is true, of course, that an offender who has engaged in a crime like armed robbery or an offender with three prior violent felonies is not likely to be an active candidate for probation; it is likely that his incarceration will be necessary in order to protect the public. But the admonition of subsection (a) is that judgments of this sort should not result in the automatic denial of probation in such cases without a hard look at the particular case presented by the particular offender.

Section 1.3(b)

A separate Advisory Committee has dealt with the propriety of considering a guilty plea as the basis for a reduced sentence. *See* ABA STANDARDS, PLEAS OF GUILTY § 1.8 (Ap-

proved Draft, 1968) [hereinafter cited as PLEAS OF GUILTY]. The point here is the slightly different one that it is in no event proper to increase the severity of the otherwise appropriate sentence merely because the defendant has pleaded not guilty or has indicated an intention to appeal his conviction. The Advisory Committee on the Criminal Trial made the same point in PLEAS OF GUILTY § 1.8 (b) & comment at 51-52. Section 1.3 (b) of the present materials is intended to state the concurrence of this Advisory Committee with the views which are there expressed.

APPENDIX NO. 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

(Filed September 17, 1974)

INFORMATION NO. 74-63

UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

JAMES R. McHALE,
DEFENDANT.

MOTION FOR CHANGE OF VENUE

Comes now the Defendant, JAMES R. McHALE, pursuant to Rules 18 and 21B of the Federal Rules of Criminal Procedure, and moves the Court to transfer the instant case to the United States District Court for the Western District of Kentucky at Louisville, stating for cause that the United States District Court for the Eastern District of Kentucky at Covington does not have venue as set forth in the Supporting Memorandum.

ADAMS, BROOKING, STEPNER
& MITCHELL
500 First National Bank Building
Covington, Kentucky 41011
ATTORNEYS FOR JAMES R.
McHALE
/s/ JOHN R. S. BROOKING

[PROOF OF SERVICE OMITTED]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

[CAPTION OMITTED]

MEMORANDUM IN SUPPORT OF MOTION FOR CHANGE OF VENUE

Rule 18 of the Federal Rules of Criminal Procedure requires that a trial be held in the District in which an offense is committed unless otherwise permitted by law. 18 USC 3237 does permit a Defendant to transfer a "Failure to File" case to the District of his residence if begun elsewhere, but no provision is made for the reverse situation. 18 USC 3237 also allows prosecution in any District in which an offense has been committed, where an offense is begun in one District and completed in another or done in more than one District.

However, it has never been held that a failure to file a tax return falls under these rules. Rather the rule has been established in such cases that jurisdiction and venue are in the District and division where an act was required to be done. *Evans* v. *U.S.,* 394 F2d 653 (1963), *DeCeasare* v. *U.S.,* 356 F2d 107 (1966) (vacated on other grounds 390 U.S. 200). When a crime charges failure to do a legally required act, the place fixed for its performance fixes the situs of the crime. *Johnston* v. *U.S.,* 351 U.S. 215 (1956), rehearing denied 352 U.S. 860. See also *U.S.* v. *Neil,* 248 F2d 383 (1957).

The United States which charges in its information that Defendant failed to file his return both with the District Director at Louisville, or with the then collection center at Covington, might argue that the return, even if sent to Louisville, would ultimately be forwarded to Covington, and thus venue lies here.

This is a false argument. The District Director, who for all of Kentucky, resides in Louisville, is the official charged with transacting all tax matters in his District, even though it is now permitted to send returns directly to service centers. The crime is committed where the collection District is centered, *U.S.* v. *Wyman,* 125 F. Supp. 276 (D.C. Mo. 1954); *U.S.* v. *Ross,* 135 F. Supp. 842 (D.C. Md. 1955); *U.S.* v. *Arborough,* 16 F.R.D. 212 (D.C. Md. 1954) *aff.* 230 F. 2d 56, *cert. den.* 351 U.S. 969. See also *U.S.* v. *Lefkoff,* 113 F. Supp. 551 (Ed. Tenn., 1953).

The salutory effect of this rule is well demonstrated in the case of Covington, Kentucky, which having its own service center is now served by the service center in Memphis, Tennessee. Over the past years, returns from Covington, have variously gone to Louisville, Covington and Memphis, as was administratively convenient to the Government. But all failure to file and other investigations are handled under the Louisville Division.

If meaningful application is to be made of the Defendant's constitutional right to confront his accusers, the case should be transferred to Louisville where these charges arose. It would be highly prejudicial to say that trying the case at Covington would not be prejudicial to the Defendant because he lives in this District, because in fact, the Defendant's business and most of his community life and waking hours are spent in Cincinnati, Ohio where he is in the process of permanent moving.

WHEREFORE, Defendant respectfully moves the Court to transfer this case to Louisville, Kentucky.

ADAMS, BROOKING, STEPNER
& MITCHELL
500 First National Bank Building
Covington, Kentucky 41011
ATTORNEYS FOR JAMES R.
McHALE

/s/ JOHN R. S. BROOKING

[PROOF OF SERVICE OMITTED]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

(Filed October 7, 1974)

[CAPTION OMITTED]

ORDER

On September 18, 1974, the attorney for the plaintiff being present, came the defendant in person and his attorney, John Brooking.

The Court heard counsel on the defendant's motion for change of venue and, being advised, overruled the motion.

Without objection on the part of the United States Attorney, it was ORDERED that the defendant may travel to the Southern District of Ohio and to the Western District of Kentucky.

It was further ORDERED that this case is assigned for trial by jury on December 6, 1974 at 10:30 A.M.

/s/ MAC SWINFORD
JUDGE

October 7, 1974

c.c.
U. S. Attorney
John Brooking

APPENDIX NO. 7

DISPOSITION OF INCOME TAX CONVICTIONS FOR EASTERN KENTUCKY – FISCAL YEARS 1968 – 1974

Docket Number	Disposition
	F.Y. 1968
	(Evade or Defeat 26 USC 7201, 2 (4510))
002586-1	1 yr. imp.
	F.Y. 1969
	(Failure to file 26 USC 7203 (4530))
009963-1	1 yr. imp. – fine
	F.Y. 1970
	(Failure to file 26 USC 7203 (4530))
009927-1	1 yr. prob.
	F.Y. 1971
	(Evade or Defeat 26 USC 7201, 2 (4510))
010068-1	1 yr. imp.
010068-2	1 yr. prob.
	(Failure to file 26 USC 7203 (4530))
010076-1	1 yr. imp.
	(Other misdemeanor 26 USC 3401-4, 6647, 7404, 5, 7 (4540))
010101-2	1 yr. prob.
010101-1	1 yr. prob.
	F.Y. 1972
	(Evade or Defeat 26 USC 7201, 2 (4510))
010053-1	5 yrs. prob. – fine

F.Y. 1973

(Evade or Defeat 26 USC 7201, 3 (4510))

011017-1 1 yr. imp. – fine

F.Y. 1974

(Evade or Defeat 26 USC 7201, 3 (4510))

000475-1 1 yr. imp.

000294-1 2 yrs. imp.

(Failure to file 26 USC 7203 (4530))

004978-1 1 mo. imp., 3 yrs. prob. – fine

APPENDIX NO. 8

DISPOSITION OF INCOME TAX CONVICTIONS FOR WESTERN KENTUCKY – FISCAL YEARS 1968 – 1974

Docket Number	Disposition
	F.Y. 1968
	(Evade or Defeat 26 USC 7201, 3 (4510))
026870-1	1 yr. imp. – fine
026783-1	2 yrs. prob. – fine
	(Other felony 18 USC 287, 26 USC 7206 (1) (2) (5) (4520))
026964-1	1 yr. imp.
	F.Y. 1969
	(Evade or Defeat 26 USC 7201, 2 (4510))
027105-1	1 yr. imp. – fine
	(Failure to file 26 USC 7203 (4530))
027162-1	6 mos. imp.
027080-1	2 yrs. prob.
	F.Y. 1970
	(Evade or Defeat 26 USC 7201, 2 (4510))
027367-1	1 yr. imp. – fine
027287-1	1 yr. prob. – fine
027288-1	– fine
	(Other felony 18 USC 287, 26 USC 7206 (1) (2) (5) (4520))
027415-3	1 yr. imp.
027415-2	1 yr. prob.
027286-1	2 yrs. prob. – fine
027415-1	5 yrs. prob.

(Other misdemeanor 26 USC 3401-4, 6647, 7404, 5, 7 (4540))

027229-1 1 yr. prob.

F.Y. 1971

(Evade or Defeat 26 USC 7201, 2 (4510))

005976-1 3 mos. imp., 2 yrs. prob. — fine
027533-1 1 yr. imp. — fine
027540-1 1 yr. imp. — fine
027469-1 1 yr. prob. — fine

(Failure to file 26 USC 7203 (4530))

027509-1 3 mos. imp. — fine
027441-1 1 yr. prob.
027445-1 1 yr. prob.

F.Y. 1972

(Evade or Defeat 26 USC 7201, 2 (4510))

027618-2 1 yr. imp. — fine
027618-1 1 yr. imp. — fine
027586-1 1 yr. imp.

(Other Felony 18 USC 287 or 26 USC 7206 (1) (2) (5) (4520))

027791-1 2 yrs. prob.

(Failure to file 26 USC 7203 (4530))

027769-1 1 mo. imp. — fine
027608-1 2 yrs. prob.

F.Y. 1973

(Evade or Defeat 26 USC 7201, 2 (4510))

027954-1 15 yrs. imp.
027954-2 15 yrs. imp.
027836-1 5 yrs. imp.

(Other Felony 18 USC 287 or 26 USC 7206 (1) (2) (5) (4520))

027502-1 3 mos. imp., 3 yrs. prob.
004979-1 1 yr. imp.

F.Y. 1974

(Evade or Defeat 26 USC 7201, 2 (4510))

740042-1 1 mo. imp., 2 yrs. prob.
740033-1 1 mo. imp., 2 yrs. prob.
740011-1 3 mos. imp., 2 yrs. prob. — fine
740012-1 1 yr. imp.
008251-1 1 yr. imp.
008259-1 1 mo. imp., 2 yrs. prob. — fine
740010-1 1 yr. imp.
008027-1 1 yr. imp.
007961-1 2 mos. imp., 2 yrs. prob. — fine

(Other Felony 18 USC 287 or 26 USC 7206 (1) (2) (5) (4520))

004985-1 1 mo. imp., 5 yrs. prob.
007936-1 18 mos. imp. — fine

(Failure to file 26 USC 7203 (4530))

008215-1 2 mos. imp., 1 yr. prob.

(Other misdemeanor 26 USC 3401-4, 6647, 7404, 5, 7 (4540))

008130-1 1 yr. prob.
006093-1 — fine
740001-1 — fine
740003-1 — fine

(Other misdemeanor 26 USC 3401-4, 6647, 7404, 5, 7 (4540))

740002-1 — fine
008180-1 — fine
008131-1 — fine

TABLE D 5. U.S. DISTRICT COURTS
CRIMINAL DEFENDANTS SENTENCED AFTER CONVICTION, BY NATURE OF OFFENSE
(TERRITORIAL COURTS EXCLUDED)
FISCAL YEAR 1974

NATURE OF OFFENSE	TOTAL DEFENDANTS SENTENCED	TYPE OF SENTENCE									
		IMPRISONMENT[1]						PROBATION	FINE ONLY	OTHER	AVERAGE SENTENCE OF IMPRISONMENT (MONTHS)[1]
		TOTAL	SPLIT SENTENCE[2]	1 YEAR AND 1 DAY AND UNDER	OVER 1 YEAR AND 1 DAY TO 3 YEARS	3 TO 5 YEARS	5 YEARS AND OVER				
TOTAL	36,230	17,180	2,900	3,333	2,880	4,107	3,960	16,623	2,078	349	42.2
GENERAL OFFENSES											
HOMICIDE, TOTAL	106	89	3	1	15	16	52	17	-	-	179.8
MURDER--1ST DEGREE	43	42	-	-	2	2	38	1	-	-	312.4
MURDER--2ND DEGREE	20	15	-	-	5	1	9	5	-	-	
MANSLAUGHTER	43	32	3	1	8	13	5	11	-	-	36.5
ROBBERY, TOTAL	1,552	1,376	31	17	29	229	1,070	176	-	-	126.5
BANK	1,439	1,287	29	13	27	190	1,028	152	-	-	129.5
POSTAL	38	31	-	-	1	8	22	7	-	-	104.5
OTHER	75	58	2	4	1	31	20	17	-	-	70.1
ASSAULT	473	248	34	71	38	50	55	199	21	5	37.7
BURGLARY--BREAKING AND ENTERING, TOTAL	207	117	11	7	15	45	39	90	-	-	60.5
BANK	55	46	3	1	-	17	25	9	-	-	91.1
POSTAL	35	25	3	-	4	14	4	10	-	-	39.9
INTERSTATE SHIPMENTS	19	11	2	2	2	2	3	8	-	-	
OTHER	98	35	3	4	9	12	7	63	-	-	44.3
LARCENY AND THEFT, TOTAL	3,276	1,261	268	231	225	363	172	1,944	55	16	29.4
BANK	155	95	15	5	4	33	38	59	1	-	53.4
POSTAL	1,171	479	87	97	111	141	43	674	10	8	26.6
INTERSTATE SHIPMENTS	858	292	79	52	50	70	41	550	16	-	26.9
OTHER U.S. PROPERTY	510	144	43	35	24	29	13	346	14	6	23.8
TRANSPORTATION, ETC. OF STOLEN PROPERTY	276	159	30	11	24	59	35	115	2	-	37.3
OTHER	306	92	14	33	12	31	2	200	12	2	22.1
EMBEZZLEMENT, TOTAL	1,493	268	141	32	44	37	14	1,192	25	8	15.3
BANK	832	160	92	16	24	19	9	654	13	5	14.9
POSTAL	364	59	32	9	6	10	2	303	2	-	13.4
OTHER	297	49	17	7	14	8	3	235	10	3	19.2
FRAUD, TOTAL	2,657	941	353	208	155	138	87	1,651	210	55	19.5
INCOME TAX	1,162	367	185	103	44	31	19	669	102	4	12.8
LENDING INSTITUTIONS	340	49	38	19	26	13	3	214	25	2	18.1
POSTAL	675	286	75	31	58	69	53	351	34	4	30.2
VETERANS AND ALLOTMENTS	12	3	2	-	-	1	-	9	-	-	
SECURITIES AND EXCHANGE	71	27	9	6	3	3	6	36	8	-	28.9
SOCIAL SECURITY	58	6	2	2	2	-	-	50	2	-	
NATIONALITY LAWS	35	8	-	4	2	2	-	20	-	7	
FALSE CLAIMS AND STATEMENTS	234	43	19	12	7	3	2	140	20	31	15.6
OTHER	270	82	23	26	13	16	4	162	19	7	17.6

POOR COPY

APPENDIX NO. 10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

[CAPTION OMITTED]

AFFIDAVIT OF JAMES R McHALE

The affiant JAMES R. McHALE after first being duly cautioned and sworn deposes and states as follows:

1. That the affiant truly did not understand that failing to file tax returns was a crime; but rather thought it a matter merely for civil penalties which he was prepared to pay; believing that filing a return without making complete payment at the same time was in fact the crime.

2. That the defendant did poorly in school, has no knowledge or expertise of any subject outside of his chosen vocation of photography and had no knowledge or understanding of tax law requirements.

3. That he had no intent to avoid payment of the money that he owed the government but simply did not understand that he had to do under the law, and has now paid his taxes to date.

4. That in fact he labored under actual mental confusion and neurosis in connection with the filing of his tax returns and has placed himself under care of Dr. John T. Toppen and is prepared to continue such treatment if the court probates him.

5. That he is the sole support of his family of a wife and three (3) daughters and that there will be no one to support them should he be imprisoned, as his only source of income is his personal business which accounts receivable do not last beyond a period of two (2) months.

6. That his imprisonment for a year would completely destroy his business which is one of personal service and is his sole means of livelihood to support his wife and three (3) daughters.

7. That he had not been in any kind of trouble before and if the Court will extend him the mercy of probation he will strive in every way to be a model citizen, support his family and support society rather than being a drain as a prisoner imprisoned at government expense with the possibility that his family might have to receive state welfare.

8. That he has genuinely repented and believes that his rehabilitation would be best completed by allowing him to practice the art of commercial photography, which is the only skill he knows, and he regrets not paying his debt to society and believes that he should be punished for it, but that he does not believe that prolonged incarceration with hardened criminals would serve the rehabilitated purpose.

/s/ JAMES R. McHALE

[JURAT OMITTED]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

[CAPTION OMITTED]

AFFIDAVIT OF JOHN W. BAUDENDISTEL

John W. Baudendistel being duly cautioned and sworn states and deposes as follows:

1. That he is a Certified Public Accountant in the State of OHIO.

2. That he was employed by Mr. McHale to represent him in his tax matters, and to otherwise get all of his tax and accounting matters current and to so maintain them. He was so employed by Mr. McHale on or about February 10, 1974, after the Internal Revenue had transferred the case to its Regional Counsels' Office in Louisville for prosecution, and remains so employed to maintain his financial and tax affairs in proper order; and that in this capacity he not only became very familiar with Mr. McHale's personal and business financial affairs, but also has gotten a rather deep insight into Mr. McHale's personal traits and characteristics and his general mode of operating his business and personal affairs.

3. That he has special training and abilities in identifying indicia of fraud and other indications of the existence of the so called "evil intent" necessary in a criminal case, developed during his past 25 years of service with The Internal Revenue Service as Revenue Agent, Supervisor,

Manager and Assistant Regional Commissioner (audit) in the Chicago Region.

4. That there are numerous mitigating circumstances in this case that are almost never associated with the case of a person who deliberately and intentionally attempts to avoid the payment of his taxes. In fact the usual "badges of fraud" are non-existent in this case.

5. That Mr. McHale is an artist, untrained in business concepts and seems totally incapable of giving his financial affairs proper personal attention.

6. That Mr. McHale's business is basically one of personal services, his personal skills are required by most of his clients, and that the business could not survive McHale's prolonged absence.

7. That this business is Mr. McHale's only source of income, that substantially all of his assets are invested in the business, and that imprisonment would deprive him and his family of a source of income until completely re-established.

/s/ JOHN W. BAUDENDISTEL

[JURAT OMITTED]

APPENDIX NO. 11

LETTERHEAD OF

PAUL ZENDER

Madison & Red Bank Roads, Cincinnati, Ohio 45227

NuTone Division — Scovill

January 14, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Ky. 41011

Dear Honorable Mac Swinford:

There are few people in this world that we can grow to call "friend" . . . even fewer when it comes to surviving the pressures of a client/supplier business relationship. But, such a person is Jim McHale, a man I am proud to know and appreciate as "friend". The man I know as friend could not willfully or deliberately harm, hurt, hinder or cheat anyone — even his competitors.

To the best of my knowledge, the tax monies due the government and state along with the maximum legal fines and interest charges have been paid. What is to be gained by further harrassment and confinement? As the head of the IRS stated in a recent issue of Business Week when asked about the tax problems of the World Football League . . . "it is not the IRS intent nor in the best interest of the government to confine individuals nor destroy business and thus inhibit their abilities to earn and pay". I feel (as a taxpayer) that restitution has been

made and that the public humiliation resulting from your verdict and sentencing is punishment enough for a human error. I believe (as a taxpayer) that justice has been served . . . nothing is to be gained through further punishment, but instead could cause lasting damage to the individual, his family and his business.

As a friend to Jim McHale I ask for your thoughtful consideration before ruling on his appeal to your court.

Sincerely,

/s/ PAUL K. ZENDER
Director of Marketing
PKZ/dh

LETTERHEAD OF

KEES SURGICAL SPECIALTY COMPANY
Box 113 Alexandria, Ky., U.S.A. - 41001

January 25, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Your Honor:

I consider it a necessity and a privilege to attest to the worthiness of James McHale to be granted a probation of his sentence.

James McHale is not the type person the imposition of this sentence would picture him to be to the community, his friends and fellow businessmen. I would consider it a grave injustice.

Not knowing, as you do, all the evidence presented, I could not judge the merits of the case presented, and certainly could not fault your judgment.

Undoubtedly James has erred in judgment, has procrastinated beyond the legal limits, but to say he did this with any idea of cheating or evading taxes is certainly not consistent with his character, nor do I believe his conscience would, under any circumstance, permit this to enter his mind.

James and I have been close personal friends for fifteen years. We have confided our most intimate and confidential feelings on personal and business interests. It was aware about four or five years ago of the present situation and we discussed his tardiness and his inability to keep abreast of the bookkeeping regarding his taxes. But at no time did he consider evasion.

James McHale, as you have undoubtedly observed in your brief but narrowed association, is an industrous contributor to society. He is revered as a friend and a person to be depended upon.

If he is incarcerated and removed from our society even for a short period his family will suffer, the community, his friends. Business and society in general will have been shortchanged.

In closing, I simply wish to identify myself by listing my affiliation with my Community and my contribution to our society.

I have served as Chairman of the Trustees of the Alexandria United Methodist Church for six years.

I have served as Trustee of the Covington District United Methodist Church for a number of years.

I have served as Chairman of the Board of Education of the Campbell County Public Schools for the past seven years.

I served as President of the Jay Dee Lanes, Inc. (a bowling lane with 200 stockholders) until its' sale.

I am the President of three Corporations with a combined worth in the area of $2,000,000.

I have been invited and will accept the position of Director in either of my choice of the two Banks in our Community.

Sincerely yours,

/s/ GEORGE KEES
GK:bkt

January 20, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Bldg.
Covington, Kentucky 41011

Your Honor:

We are addressing the Court relative our sincere interest in the James R. McHale case.

We have been neighbors to the McHales for 17 years and always have placed complete trust in Mr. and Mrs. McHale. Trust is mentioned because our children have been on vacations and short trips with the McHales and the childrens' welfare while away from us was strictly attended to. Never have any of the children complained

of neglect or any other misconduct whatsoever. To this day, my wife and I would not hesitate to have our family in the care of Jim and Georgianna McHale.

The Scott family realizes that you must make legal decisions according to Law, yet we earnestly ask that you review the McHale situation with a view towards lightening the burden on Mr. McHale's family.

We hope, Your Honor, that you do not interpret this plea as an objection to your findings; on the contrary, we have the utmost confidence in your Court. Again, it is merely our sincere interest in this good family.

Very Truly Yours,

/s/ ROBERT E. SCOTT
/s/ NORMA W. SCOTT
128 Lyndale Rd.
Edgewood, Ky.
41017

38a

LETTERHEAD OF

WALTER N. FOSTER

2778 Eugenie Lane — Cincinnati, Ohio 45211

January 15, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Judge Swinford:

This letter is in behalf of James R. McHale, one of my closest friends. Jim and I met about twenty years ago when he was handling industrial photographic assignments for a local studio. Our business acquaintanceship grew over the years into a close family relationship. My family holds fond, warm personal feelings for Jim, his wife and children.

I know Jim to be an honest, upright, hardworking familyman with a well deserved reputation as one of the leading professional industrial photographers in this area. The present status of his studio grew from a small garage setup over the years because of the outstanding excellence of Jim's work, countless long hard hours of work and sacrifice, and his faith, endurance and persistence.

Jim is an actively interested patriotic American. As an example, for years he has donated services to the local U. S. Naval Sea Cadets, and has donated photographic assistance to the U.S. Naval Reserve. He is a concerned citizen interested in national groups which are striving to make America a stronger, better nation. His character is sterling — he is a solid citizen.

In a recent hearing in your Court, Jim was found guilty of failing to file income tax returns; taxes having been paid. As I understand, sentence was passed.

As a longtime friend of Jim and his family, my family and I beg you to consider placing Jim on probation instead of imprisonment. Surely, justice would be served in this manner more appropriately than confinement.

The nature of Jim's photographic business requires his personal attention continuously. The expertise which he possesses can not be delegated or assigned to another. His confinement would seriously jepordize (sic) his business, if not ruin virtually all of the progress he has worked so diligently for years to accomplish.

Please accept my assurance that Jim is the calibre of citizen and hardworking individual who deserves utmost consideration in this unhappy instance. Please consider probation for Jim, I earnestly beg of you.

Respectfully,

/s/ WALTER N. FOSTER

LETTERHEAD OF

ADVERTISERS' CLUB OF CINCINNATI

January 9, 1975

The Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

FOR YOUR CONSIDERATION, SIR:

Probably one of the most ineffective things a group of private citizens can attempt is to try to reverse a legal decision once it has been made.

I am in complete accord with our Country's judicial system and fully aware of the high responsibility in adhering to the letter of the law.

But I feel too that since we work daily with humans, there are times when deserving people should be given a reasonable chance.

Mr. James McHale was recently convicted of a misdemeanor resulting from failing to file. Since this conviction was made by more learned legal heads than I, I cannot presume to editorialize on the verdict.

However, it seems harsh indeed to those of us who know and work with Mr. McHale.

I know Jim McHale. I know him as an honest, cooperative, hardworking member of the advertising and graphic arts community. I know him also as a good corporate citizen who has given freely of his time and talents in the community he serves.

It is inconveivable to his many friends that Mr. McHale would willingly and knowingly attempt to evade any obligation.

Sir, I call this case to your attention in the only way I know how, to alert you to probationary consideration within whatever legal limits are required for a just decision.

Mr. McHale is a valuable member to the creative arts profession as well as to his community. Removing him from our community society could have devastating affects on the successful business he has worked so hard to build.

As a member of the board of directors of the Advertisers Club of Cincinnati, as his peer and as his friend, I respectfully ask your consideration in granting probation of sentence to Jim McHale.

Sincerely,

/s/ JOE SETA

Honorable Mac Swinford
United States Judge
Eastern District Of Kentucky
Federal Post Office Building
Covington Kentucky 41011

Jan 14- 1975

By Dear Judge Mac Swinford

My name is John E. Mumme a employ of James R. McHale since January 1964. During this time I have helped him to promote his business from a small studio in a garage to the finest studio in Cincinnati Ohio.

This has only been made possible by his hard work and long hours joined with a strong desire to make it the finest. He has been generous to all his employes. In doing so it has made a good lively hood for them, myself and our families.

He has built this business of his by making every client a personal friend of his. Often accepting their responsibility to produce the final results.

With this aggressiveness and insistence of quality work has made him a leader in his field.

With out his help, his suggestions and results McHale Studios and clients would suffer greatly with his absent. I am writing this letter in the interest of everyone concerned, that you will please reconsider his probation.

Sincerely

/s/ JOHN E. MUMME

LETTERHEAD OF

McHALE STUDIO

2349 Victory Parkway, Cincinnati, Ohio 45206

January 17, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Judge Mac Swinford:

In regards to the recent trial and conviction of James R. McHale on a tax charge, I would like to express a few thoughts and a hope for leniency.

Aside from the fact that Jim has been a strong friend and a more than fair employer for eight years, I, being an employee, feel compelled to take a very mercenary outlook towards the forthcoming year.

A small business such as "ours" seems at times to be built on approximately 75% friendship. There is usually one man in each small company who has the personality and charisma to generate business friendships – Jim McHale is this man. The fact that he has doubled his studio size and hired several new employees' in the past year bears this out.

I, being one of eight employees, who in turn, have a total of fifteen dependents, means quite a few people have a real fear for the survival of "our" business, if Jim McHale has to serve his sentence.

I do believe strongly in justice and our courts, and I do believe a person should pay for his mistakes. Jim McHale

has already paid quite dearly with the newspaper and T.V. coverage. Even a small sentence during this extremely bad economic time could seriously impair "our" business and even cause its complete collapse.

Kindly reconsider probation for Jim McHale.

Respectfully,

/s/ JAMES B. YOUNG

JY/nda

LETTERHEAD OF
INTERMEDIA

January 21, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Judge Swinford:

I am writing in behalf of Mr. James McHale who, I understand, is petitioning for reconsideration of probation.

Jim has been a business associate and a friend for about 20 years. I consider him to be a person of good character, and a real asset to our community.

His conviction has been a traumatic experience for him and his family. Ie believe a prison sentence would be extreme and even unusual punishment for one who has already paid a high penalty for his mistake.

As a resident of Kentucky, I have been aware of and impressed with the fairness of your court. I don't mean to question your judgment in having passed sentence. However, I have known Jim personally and professionally for most of my life, and I earnestly believe him to be worthy of probation.

Sincerely,

/s/ JAMES A. WILLMES
President

LETTERHEAD OF

CINCINNATI INDUSTRIAL ADVERTISERS' CLUB

January 14, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

My Dear Judge:

This letter is a plea to you for leniency on behalf of my good friend, James R. McHale.

I have known Jim for some fifteen years and during that time he has always impressed me with his character, fair sense of play and willingness to involve himself in community activities.

He has built an exceptional business from a very meager beginning . . . a good number of people in Cincinnati either are employed by Jim or received their early training from him.

Jim is a member of the Cincinnati Industrial Advertisers' Club and as a Director, I can personally attest to the many worthwhile projects he associated himself with.

Thank you in advance for your consideration.

Sincerely,

/s/ RAYMOND R. KLETTE
Director

RRK/gbf

January 14, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

My dear Judge Mac Swinford:

I have known Mr. James McHale for over thirty five years. First, as my music student at Beechwood High School, then as a fellow employee at Brand Studios, and now, years later, as my employer.

In High School, he was a good musician, made all rehearsals, played the concerts, was always dependable and a pleasant, fun student to be around.

After I left teaching, entered the photography profession we met again and became the best of friends. He went on to become a highly skilled, competent photographer.

During this period, I became gravely ill with tuberculosis and was confined for a long time in Dunham Hospital. We all think we have friends, but extended illness brings out the true friends and Jim McHale was surely one of those. He found time in his busy life to visit me quite often, even though he was working at Brand Studios and trying to build a home. He sometimes brought hobby craft kits to help pass the long and lonesome hours.

He finally left Brand Studios to go into business for himself and he has become a very successful, respected photographer honored for his fine work. Wherever I have gone the name of Jim McHale has always been well spoken of

Photography is a hectic, challenging sometimes frustrating business and Jim has been a trieless worker, always giving more of himself than he has asked of his men. He is most fair to all of us, and his clients not only have great respect for his ability but enjoy his friendliness and many kindnesses. Jim is a great sportsman and goes by the rules at all time.

We are a small company with a very limited staff, where each man is important, but Jim McHale is the catalyst that make everything, "go". We really need him, and hope all will be well.

Sincerely yours,
/s/ VERNON F. WAHLE

Honorable Mac Swinford
United States Judge
Eastern District of Ky.
Federal Post Office Building
Covington, Ky.

Dear Sir, I am writing in the interest of my neighbor James R. McHale who will soon appear before you to reconsider his case in regards for (to) probation. I learned from his wife that her husband has already paid the fine required of him

Also this family of five daughters, father & mother have been our neighbors for twenty five years & we "Froelichers" can attest to James good character, not to mention the help he rendered neighbors without pay, anyone in our little community will agree. In closing Your Honor will you please reconsider James McHale's case & not send him to jail so his family won't have broken hearts, as also our close knit neighborhood would have.

Thanks for reading my letter.

Sincerely

/s/ MRS. EMILY FROELICHER
/s/ F. A. FROELICHER

LETTERHEAD OF
HUGAN, MOSER, PERRY, P.S.C.
Internal Medicine
3104 Dixie Highway, Erlanger, Kentucky

January 20, 1975

C. Hugan, Jr., M.D.
Roy J. Moser, M.D.
Charles R. Perry, M.D.

Honorable Judge Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Sir:

We are writing on behalf of James McHale, who was recently sentenced in your court.

We have known Mr. McHale since boyhood. We were in close association during those years and in recent years lived immediately next door to Mr. McHale for four years. We have had nothing but the highest regard for Mr. McHale's character. We have always felt that he abounded in natural charity and have never observed any signs of maliciousness. I cannot attest to his business ethics but I have always known him as a man who would quickly respond to any plea for moral or material support. Mr. McHale's recent difficulties affected me with shocking disbelief. This could not have been the James McHale that I have known so well and so long. I earnestly hope that my sincere portrayal of the defendant will help to assure a just resolution of his problem.

Sincerely,

RJM:mac /s/ ROY J. MOSER, M.D.

Cincinnati, O. 45230
January 16, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Ky. 41011

Dear Sir:

I feel rather hesitant writing you, your honor, on this matter, but I sincerely believe I must relay to you my personal feelings about my close friend, Jim McHale.

Being fairly young in the commercial art business, ten years, I have worked with Jim most of that time as his client. During this time he has not only taught me a great deal, but I have found him to be one of the most sincere, consciencious, hard-working, and honest men I have ever had the privilege to meet. The photography field, like many others, is primarily a service business, depending almost entirely on its key man. Jim has not only directed all the work to be photographed, but does a great deal of the preparation and shooting himsel. This, I am sure, is where the problems Jim is now facing began. He has neglected one of the major responsibilities of a citizen because of the pressures and demands he faces in the every-day routine of his profession.

I personally would be heartbroken to see Jim and all his employees loose what they have all worked to achieve. A photography studio that is creative and respected is not developed in a short time, but demands years of hard work and patience to reach the top of the field. Should Jim be absent for some time, the damage to the business would be serious, indeed.

Thank you for your consideration in this matter.

Yours truly.

/s/ DONALD APPLEMAN

BLEED THROUGH

LETTERHEAD OF

R. G. (BOB) WALTHER

Ninth & Lowell Streets, Newport, Kentucky 41072

Mr. and Mrs. Robert G. Walther
753 Robin Lane
Villa Hills, Kentucky 41011
January 27, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington Kentucky 41011

Dear Sir:

My wife and I have been friends of Jim and Georgianna McHale for twenty years. Our children have grown up together.

Jim is a good father, husband and community leader. He has given of his time and energy to age group swimming, tennis and softball.

Please consider a probated sentence for James R. McHale.

Sincerely,

/s/ ROBERT G. WALTHER
/s/ MARY JOE WALTHER
Robert G. and Mary Jo Walther
(Mobley)

LETTERHEAD OF
INTERMEDIA

January 20, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Judge Swinford:

Jim McHale is one heck of a guy.

I have known Jim for about eighteen years now. As a businessman; as a supplier and associate; as a friend.

Jim has gained the respect of his customers and associates through hard work; sincere dedication to the task at hand; his candidness; his concern for professional achievement and excellence in every project; his integrity in his relationships.

I can count of Jim McHale. I can trust Jim McHale.

I'm aware of his current tax problems. And I believe he deserves your consideration for probation.

Sincerely,

/s/ ROBERT B. MAEHR
Chairman of the Board

/bw

LETTERHEAD OF

LA SALETTE ACADEMY

700 Greenup Street, Covington, Kentucky 41011

January 15, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky

Dear Judge Swinford:

We are writing this letter at the suggestion of Mr. James McHale's attorney and at the request of his family.

We have the highest esteem both personally and professionally for Mr. McHale. He has been associated with La Salette Academy since 1964 when he enrolled the first of four daughters who attended school here.

In the ten years we have known him, we have found him to be generous beyond words, always cooperative and very willing to help us in any way he could.

I gladly cite the following examples of his loyalty and service:

1. For years he sent monthly donations to La Salette because he felt it was the just thing to do since the girls schools receive no support from the parishes and the boys schools do.

2. Mr. & Mrs. McHale were always available to chaperon dances and school functions.

3. Mr. McHale set up photography booths and ran them for our festival.

4. When we set up a dark room here, we sought his advice. The result was a new flash attachment for our camera and all the chemicals and paper we needed. We've yet to receive a bill from the camera shop.

5. Mr. McHale spent one whole afternoon taking a transparency for use in our yearbook and has charged us nothing for his time or materials.

Both Mr. & Mrs. McHale have been very supportive and enjoy an unblemished reputation of generosity and co-operation.

Sincerely,

/s/ SISTER MARY JANE BAMBERGER
Principal
and Faculty of La Salette Academy

LETTERHEAD OF

CAMPBELL/TURNER AND ASSOCIATES, INC.
2145 Luray Ave., Cinti., O. 45206

January 8, 1975

The Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Sir:

This letter is in regard to the United States District Court action against Jim McHale.

My business and personal relationship in the last nine years with Jim has shown me that without him, the advertising art industry would be at a great loss. He is the most honest and respected businessman I have ever been acquainted with. He has progressed from a two to an eleven man photography studio with outstanding workmanship, that is not only a great asset to my company, but also various other companies and industries throughout the Greater Cincinnati Area.

Aside from all business aspects, I would like to express personally that he is a man of great human and charitable qualities.

I sincerely hope that you would grant Mr. McHale a probation because I feel the public as a whole and our agency specifically would be a great loser if he was not allowed his freedom.

Sincerely,

CAMPBELL/TURNER & ASSOCIATES, INC.

/s/ JAMES W. CAMPBELL
President

JWC/aw

LETTERHEAD OF

RICHARD A. THOMPSON AND ASSOCIATES
P. O. Box 92, Fort Thomas, Kentucky 41075

January 17, 1975

Honorable Mac Swinford
U. S. Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Sir:

This letter is being sent on behalf of my very good friend James R. McHale.

Jim made a terrible judgement error with his income tax, but you are more aware of the facts than I.

Let's look at the good side of the ledger. Jim McHale is a good man. He is a good husband and father and shows it in the love of his family.

This man is a craftsman. He is one of, if not the best commercial photographers in our tri-state area. He is an employer, providing jobs for more than ten employees.

He is first, last and always a loyal American. Tax mistakes or not, his love for this country cannot be questioned.

I feel this man has already paid a large enough penalty for his mistake. Not only the interest and penalties, but the publicity.

I feel quite honored that Jim McHale also feels I am a friend of his.

Sincerely yours,
/s/ RICHARD A. THOMPSON

RT/br

LETTERHEAD OF
CAMPBELL/TURNER AND ASSOCIATES, INC.
2145 Luray Ave., Cinti., O. 45206

January 9, 1975

The Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Sir:

A good man, Jim McHale, is in trouble . . . and I feel an obligation to express my opinion about this most respected man among his peers.

I have a business and personal relationship with Jim going on nine years. Should he lose his freedom, because of the court action against him, it will provide a great loss to my business and to the lives of many in the graphic arts industry.

However, it is not enough to say business will not be as usual, because of this action.

In Jim's case, one first realizes the man. This is a man of great charitable quality toward his fellow man. I have never known Jim not to go out of his way to be helpful to people he has contact with. He is most respected in his community as a family man, friend, supporter in community functions, and one who cares about his fellow man.

It is my hope that the law can allow compassion in Jim's case and grant him a probation.

Sincerely,

CAMPBELL/TURNER & ASSOCIATES, INC.
/s/ BRUCE E. TURNER
Vice President BET/bla

January 17, 1975

The Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Sir:

This letter is in regard to the United States District Court case against Jim McHale.

I have known Jim for the last several years in both a business and personal relationship.

As an Art Director for the Procter and Gamble Company, I have worked with Jim on a professional level. I would like to say that he is one of the most professional and sincerest photographers that I have dealt with. If the Cincinnati advertising community were to lose his services, it would indeed, be a loss.

Jim has also been a personal friend over the last several years. I consider him to be a warm, generous person with high ideals. To me, his character is beyond question. I like to think of him as my friend.

Thank you for your consideration.

Sincerely,

/s/ PAUL R. CAMPBELL

2737 Cleinview Ave.
Cincinnati, Ohio 45206

LETTERHEAD OF

WILDER-FEARN & ASSOCIATES, INC.
Holiday Park Tower, 644 Linn Street
Cincinnati, Ohio 45203

January 15, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Your Honor,

I have known James R. McHale for the past ten years both as a businessman and a personal friend.

Professionally, he is one of the most talented photographers in this area. He is an ethical person. In the advertising business, this is quite a compliment as ethics are sometimes overlooked for sensationalism to "sell a product!". He takes his work seriously and is considered a competent businessman by his fellow associates Most of these associates become his close friends. In essence, he is a very likeable person.

Mr. McHale's life outside of his studio is that of a family man. He enjoys the comforts of home life; he and his family are very close.

Jim McHale is a good friend of mine. He is an understanding and fair person. I, for one, can attest to his good character.

Respectfully,
/s/ GARY L. FEARN
President

GF:dm

January 10, 1974

The Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky, 41011

Dear Sir:

I have known Mr. James R. McHale on a business and social basis for the past several years.

In my business relationship with him, he has never been other than fair and competent, and beyond building up an excellent photographic studio, in doing so he has aided and supported the advertising/business community in the Tri-State area.

On a personal basis, Jim McHale has impressed me as an intensely interested and caring family man, and an asset to his neighborhood and community.

Sincerely,

/s/ JOHN S. REECE

1003 Omar Place
Cincinnati, Ohio 45208

jr:kr

January 27, 1975
Lawrenceburg, Ind.

Dear Judge Swinford:

I'm writing this letter with mixed feelings. While I have the upmost respect for the law and realize that it can only be as good as it is enforced, I am also very concerned about my family and the present economic conditions.

I understand that there will be a motion to the court to reconsider probation for Mr. James R. McHale, so I'm writing this letter in support of such action.

My concern is the present economic condition and the effect of business during Mr. McHale's absence. While it is true that things may go on with little or no problems during such absence during better economic conditions. I feel that the way things are now it will take all the old contacts, etc., to keep things going.

I can only speak of Mr. McHale as an employer as I know little of his business or private affairs. My first contact was in 1971 when economic conditions such as we have now closed a studio I was with in Dayton, Ohio. Mr. McHale was hiring at the time and was very truthful about the fact that he could only guarantee 6-8 weeks of work. I consider this a plus for the man, as most people like to slip past a point like this.

During this period I have nothing but praise for Mr. McHale in employer-employee relationship.

We made contact again in April 1974 and I am with McHale's Studios now. I feel that Mr. McHale has treated me more fairly than any employer in the past. The studio policy are very good. I feel that for the size of the operation they could hardly be better.

I was not in your court during the trial and do not know all the details that brought about your decision. I can only hope that in the event that motion to the court to reconsider probation comes before you, that you think of the people that may be affected by your decision.

Thank you for your time and patience.

Your truly,

/s/ HAROLD I. FULLENKAMP

LETTERHEAD OF

ACME SASH & DOOR COMPANY
1250 Tennessee Avenue, Cincinnati, Ohio 45229

January 27, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Judge Swinford:

I have been a close acquaintance of Mr. James R. Mc Hale for the past thirty eight years, having attended grade school in Ft. Mitchell, Ky. with him back in the late thirties and early fortys.

Mr. Mc Hale and I both entered the U.S. Army together on January 10, 1945 and were stationed together at the infantry replacement center at Camp Wolters, near Fort Worth, Texas. Our officers respected Mr. Mc Hale's talents to the degree that when our company was assigned

to overseas duty, they saw fit to have him stay at Camp Wolters and assigned him to their permanent staff.

I have kept up my friendship with Mr. McHale through the years and have always found him to be generous to a fault in helping his fellow men, sometimes to the detriment of his own well being.

I know of no instance when he has ever turned down a request for help from friend or neighbor, and there have been many requests.

Mr. Mc Hale's incarceration would be a definite loss to the community, his friends and above all to his family.

I would appreciate any consideration you could extend to Mr. Mc Hale.

Yours truly,

/s/ JOHN H. SCHEPER
President

JHS:gn

134 Lyndale Road
Edgewood, Kentucky 41017
January 16, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Honorable Mac Swinford:

James McHale has been a close neighbor and personal friend of ours for over ten years. We consider him to be a loyal friend.

He has always made himself readily available for assistance to neighbors and the community. He has demonstrated outstanding moral character and we believe imprisonment would be a gross mis-carriage of justice.

Thank you for your consideration.

/s/ NORMA HEWLING
/s/ OAKLEY HEWLING

LETTERHEAD OF

TRECK PHOTOGRAPHICS INC.
3035 Reading Road, Cincinnati, Ohio 45206
1974 Harrodsburg Road, Lexington, Kentucky 40503

January 17, 1975

Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Judge Swinford:

I am writing this letter to you with reference to Mr. James R. McHale, of Edgewood, Kentucky.

I am aware of Mr. McHale's recent court appearance and the charges of tax evasion. I wish to advise you that I have personally known Mr. McHale for approximately nine years as a customer of TRECK PhotoGraphic, Inc., Cincinnati, Ohio. During those years that I have become acquainted with Mr. McHale I have always found him to be of very good character in his business dealings with us and know of his many customers who can attest also as to his character, honesty and community contribution to the photographic industry.

We would hope you would accept this letter from a friend and business man of Mr. McHale and that every consideration will be given him for probation.

Sincerely,

/s/ J. V. POND
Manager

JVPond:TS

LETTERHEAD OF

LUNKENHEIMER

P.O. Box 14360, Cincinnati, Ohio 45214

January 16, 1975

The Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Your Honor:

I have personally known Mr. Jim McHale for fifteen years and have dealt with him professionally for the same length of time.

I have always found him honest, dedicated and loyal. Jim should be considered for all the leniency that you can afford him in this situation. Jim has been a good friend and will continue to be.

Sincerely,

/s/ PAUL L. TAYLOR
Advertising Manager
THE LUNKENHEIMER
COMPANY

PLT:hb

January 24, 1975

Honorable MacSwinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Sir:

I have known James R. McHale for approximately twenty-five years. As the owner of a well-established advertising art studio, I have worked with him on numerous photographic assignments. Through his diligence and talent he has built a highly respected business upon which many advertising agencies, art studios and corporations depend for quality photography, excellent service, and more importantly, personal ability of Jim McHale.

Many young photographers have been helped in their careers, and his staff is totally dependent upon his personal participation and direction in his studio. His absence would seriously impair the continued success of his business, his clients, and the jobs of his employees.

I have found James McHale always to be very reliable, considerate, and of high character. I sincerely hope he is given the opportunity to pursue his profession and that you will be magnanimous in granting him probation. He has suffered much humiliation and I am sure that he will *never* commit the same misjudgment again.

Kindly reconsider his probation.

Respectfully,
/s/ SAM W. LIPSON
President

SWL/n

LETTERHEAD OF
KENNER PRODUCTS

January 20, 1975

The Honorable Mac Swinford
United States Judge
Eastern District of Kentucky
Federal Post Office Building
Covington, Kentucky 41011

Dear Judge Swinford:

This is in reference to the case concerning Mr. James R. McHale.

It has been my privilege and pleasure to have known Jim McHale for over the past 28 years. I consider him one of my very closest friends and feel that I know him and his family as well as anyone.

I can say in all truthfulness and honesty that I have never in my life known Jim McHale to intentionally do one single dishonest thing.

I remember when Jim McHale started his own photography business 15 to 17 years ago and I know that he has worked extremely hard and put in many long hours to develop this business. I know for a fact that he is highly thought of in the advertising and photographic industry.

Having known Jim McHale for such a long time, I feel I also know that he personally was 100% involved in the operation of his business and it is my honest observation that his business would be endangered by his absence for any length of time.

In addition to our personal friendship between each other, our families have also always been quite close socially. As

BLEED THROUGH

you probably know, Jim has five children and I can personally vouch that he has always been a devoted father and family man.

Knowing Jim as well as I do, it is understandable to me that he may have been careless but it is incomprehensible for me to believe that he has ever been deliberately dishonest.

I am writing this in hopes that it will help you to decide to give Jim McHale probation.

In case you want to know a little bit about my own background, I have lived in Northern Kentucky all my life and have been associated with Kenner Products Company for the past 14 years. I have recently been promoted to the position of Vice President of International Marketing and I assure you, I value my own reputation very highly and I would not make a recommendation for even my closest friend unless I felt that what I said was true.

Jim McHale is a very kind individual and also very thoughtful of others. I am proud to say that I consider him one of my closest friends.

I would greatly appreciate your taking into consideration this testimonial and if I can supply any additional information or if you would like to talk to me personally, I would be most happy to do so at your convenience.

Sincerely yours,

/s/ EDWARD A. THELEN

EAT/rm

APPENDIX NO. 12

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

(Filed March 24, 1975)

[CAPTION OMITTED]

ORDER

The defendant herein having moved the Court to reduce his sentence heretofore imposed on December 10, 1974 by the late Mac Swinford, and the Court being sufficiently advised,

IT IS ORDERED that said motion be, and the same hereby is, OVERRULED.

This the 24th day of March, 1975.

/s/ H. DAVID HERMANSDORFER,
JUDGE

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1167

JAMES R. MCHALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on three counts of willfully failing to file income tax returns for the years 1968, 1969, and 1970, in violation of 26 U.S.C. 7203. The court of appeals affirmed by order (Pet. App. No. 2, p. 3a). The evidence showed that petitioner, a photographer, had gross income of over $43,000 for 1968, over $42,000 for 1969, and over $27,000 for 1970; he was therefore required to file income tax returns, which he failed to do. The various reasons given by petitioner for his failure to file included negligence (Tr. 19, 53);[1] that he did not feel he had sufficient money to pay the tax due (Tr. 28, 53, 97, 119); that he did not have time to prepare the returns (Tr. 28, 53, 105); and that

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[1]"Tr." refers to the trial transcript.

he did not know he could file returns without paying the tax (Tr. 53, 97). After considering the presentence report and according petitioner his right of allocution, the district court imposed concurrent sentences of one year's imprisonment on each count.

1. Petitioner first argues (Pet. 6-12, 14-19) that the concurrent one-year prison sentences are excessive and deprived him of due process of law. But the fixing of penalties for crimes is a congressional function, and the question of sentencing is within the trial court's discretion so long as the sentence does not exceed the statutory limit. See, *e.g.*, *United States v. Tucker*, 404 U.S. 443, 447; *Cooper* v. *United States*, 403 F.2d 71, 73 (C.A. 10); *Hayes* v. *United States*, 238 F.2d 318, 322 (C.A. 10), certiorari denied, 353 U.S. 983; *Moore* v. *Aderhold*, 108 F.2d 729, 732 (C.C.A. 10); *Davidson* v. *United States*, 411 F.2d 75, 77 (C.A. 10) and cases cited therein; *United States* v. *Tobin*, 429 F.2d 1261, 1265 (C.A. 8); *United States* v. *Bernstein*, 417 F.2d 641, 644 (C.A. 2); *Burch* v. *United States*, 359 F.2d 69, 73 (C.A. 8); *United States* v. *Pruitt*, 341 F.2d 700, 703 (C.A. 4); *Miller* v. *Gladden*, 341 F.2d 972, 977 (C.A. 9). If a sentence is within the statutory limits, the federal appellate courts will ordinarily refuse to set it aside unless it constitutes a cruel and unusual punishment. See, *e.g.*, *Hayes* v. *United States*, *supra*, 238 F.2d at 322; *Moore* v. *Aderhold*, *supra*, 108 F.2d at 732.

Thus, for example, in *United States* v. *MacLeod*, 436 F.2d 947, 951 (C.A. 8), certiorari denied, 402 U.S. 907, the defendant was convicted of three counts of willfully failing to file returns, the same offense of which petitioner was convicted. Although MacLeod's gross income was less than that of petitioner, he was given a more severe sentence — a one-year term of imprisonment, a fine of $10,000 and five years' probation. Nevertheless, his sentence was upheld on appeal because it was held not to constitute cruel and unusual punishment. There was

nothing improper about petitioner's sentence. While he could have received three consecutive one-year sentences and $30,000 in fines, the court imposed only concurrent one-year sentences and no fine.

2. Petitioner further contends (Pet. 12-13) that the district court erred in denying his motion for a change of venue. It is settled, however, that where the crime charged is the failure to do a legally required act, the place fixed for its performance determines where venue properly lies. *Johnston* v. *United States*, 351 U.S. 215; *United States* v. *Daniels*, 429 F.2d 1273 (C.A. 6). Here, petitioner was required to file his returns either with the District Director of Internal Revenue at Louisville, in the Western District of Kentucky, or with the Director of the Internal Revenue Service Center at Covington, in the Eastern District of Kentucky. 26 U.S.C. 6091(b)(1). Thus, venue lay in either of the two judicial districts, with the option given to petitioner to have venue transferred to the district of his residence. 18 U.S.C. 3237(b); H.R. Rep. No. 1915, 89th Cong., 2d Sess. 5 (1966); S. Rep. No. 1625, 89th Cong., 2d Sess. 5 (1966). Since the prosecution was brought in the district of petitioner's residence, the district court correctly denied his motion to change venue to the Western District of Kentucky.[2]

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[2]There is no basis for petitioner's claim (Pet. 14, *et seq.*) that the district court erred in denying his motion for reduction of sentence without granting him a hearing. It is settled that such motions (see Rule 35, Fed. R. Crim. P.) are addressed to the sound discretion of the district court. Thus, that court was not required to grant a hearing. *United States* v. *Jones*, 490 F.2d 207 (C.A. 6), certiorari denied, 416 U.S. 989; *United States* v. *Maynard*, 485 F.2d 247, 248 (C.A. 9).

3. Finally, petitioner contends (Pet. 19-24) that the jury was improperly instructed on the issue of his state of mind and that the trial court failed to draw the necessary distinctions between insanity and the "mere absence of the 'willfulness' element" (Pet. 21). But petitioner did not object to this instruction (Pet. 20) either at trial or in the court of appeals, and there are no exceptional circumstances to warrant consideration of the point by this Court in the first instance. See Fed. R. Crim. P. 30; *Duignan* v. *United States*, 274 U.S. 195, 200; *Husty* v. *United States*, 282 U.S. 694, 701-702; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

At all events, petitioner's psychiatrist testified at trial that petitioner "show[ed] an obsessive, compulsive personality, that he show[ed] poor judgment, that he [was] inclined to mood swings, often with depression" and that this amounted to mental illness (Pet. 19); he further stated that in his opinion petitioner had "no willful intent to cheat the government or to defraud anyone" (Pet. 20). The trial court's instruction, to which petitioner now takes issue, was as follows (Tr. 159):

> [I]f you believe that he was in such a mental state on these three different occasions, three different times, that he was incapable of intentionally and willfully and knowingly evading the law, then, of course, you should find him not guilty.

Contrary to petitioner's contention (Pet. 20), the instruction was not "tantamount to the requirement for a defense of insanity." The court clearly told the jury that petitioner was not claiming insanity (Tr. 158). In fact, the instruction was overgenerous to petitioner. For the misdemeanor of failing to file tax returns, the concept of willfulness entails no purpose or motive other than knowingly to evade the law's filing requirements.

United States v. *Bishop*, 412 U.S. 346; *United States* v. *Haseltine*, 419 F.2d 579, 581 (C.A. 9). Since petitioner did not raise an insanity defense, he could be found to have "the capacity to act willfully. The question is whether he did in fact so act." *United States* v. *Haseltine, supra*, 419 F.2d at 581. The fact that failure to file was associated with psychological pressures does not exclude a clear, sane and conscious purpose not to file unless those pressures rendered petitioner incapable of intentionally evading the filing requirements. The trial court's instructions therefore fully conformed to the applicable standard. *United States* v. *Fahey*, 411 F.2d 1213 (C.A. 9), certiorari denied, 396 U.S. 957; *United States* v. *Hazeltine, supra*, 419 F.2d at 581.[3]

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[3]The district court's instructions in this case do not implicate the question presented in *United States* v. *Pomponio*, 528 F.2d 247 (C.A. 4), in which the Solicitor General has authorized the filing of a petition for a writ of certiorari. The question presented in *Pomponio* is whether a conviction under the various criminal tax statutes that employ the term "willfully" (26 U.S.C. 7201-7207) requires a finding that the taxpayer had a "bad purpose" or "evil motive," as the court of appeals held, or whether it is sufficient under this Court's decision in *United States* v. *Bishop*, 412 U.S. 346, 360, that the taxpayer is found to have committed "a voluntary, intentional violation of a known legal duty." Here, however, the district court's instructions (Tr. 159-161) on the question of willfulness were taken from those set forth in *United States* v. *Rosenfield*, 469 F.2d 598, 600-601, n. 1 (C.A. 3). In this case, the district court charged the jury that "[a] failure to act is willful if voluntary and purposeful and with the specific intent to fail to do what the law requires to be done, that is, with the bad purpose to disobey or disregard the law." The use of the term "bad purpose" meets the standard established by the Fourth Circuit in *Pomponio*.

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